

JUNE D. ZANG,
appellant,

v.

DEFENSE INVESTIGATIVE SERVICE,
agency,

DOCKET NUMBER
PH04328310657

DATE: JAN 15 1985

The appellant was reduced in grade from a GS-5 Lead Personnel Security Clerk position to a GS-4 Personnel Security Clerk position, based on charges of having failed to meet the performance standards of the only critical element of her job. She appealed that action to the Board's Philadelphia Regional Office.

Following an oral hearing, the Board's designated presiding official issued an extensive initial decision concluding that the agency had not shown by substantial evidence that the numerical production standard, which the appellant was charged with failure to meet and which she challenged as unreasonable, was bona fide and workable, consistent with Siegelman v. Department of Housing and Urban Development, MSPB Docket No. DC04328100293 (January 10, 1983). She thus found that standard arbitrary and capricious in light of certain circumstances of this case and concluded that it could not be applied to the appellant here. She also found that one portion of the first of the six specifications listed in the notice of proposed removal, charging her with an excessive error rate for July of 1982, was sustained.

The presiding official also found, however, that the agency committed several harmful procedural errors which precluded her from affirming the demotion. Those harmful errors, according to the presiding official, were the agency's failure to notify the appellant of her rights under its administrative grievance procedure and its denying her her statutory and regulatory right to a reasonable opportunity to demonstrate acceptable performance before instituting its adverse action against her. She therefore reversed the agency's decision to reduce the appellant in grade. The agency's petition for review of that decision is hereby GRANTED pursuant to 5 U.S.C. § 7701(e)(1).

Since the issuance of the initial decision in this appeal, the Board rendered its decision in the appeal of Sandland v. General Services Administration, MSPB Docket No. PH04328310205 (October 22, 1984), regarding the issue of opportunity to demonstrate acceptable performance. We held in Sandland that, in an appeal of an agency's performance-based demotion or removal action under 5 U.S.C. Chapter 43, the agency has the burden of proving by substantial evidence that, before undertaking the action, the agency afforded the appellant an opportunity to demonstrate acceptable performance. We concluded that, based on Chapter 43 and its implementing regulations and legislative history, an employee's rights to a meaningful opportunity to improve under 5 U.S.C. § 4302(b)(6) is one of the most important substantive rights in the entire Chapter 43 performance appraisal framework.

Because the presiding official did not have the benefit of that decision when issuing her initial decision, she mistakenly addressed this issue in terms of harmful procedural error. However, we agree with her ultimate

conclusion and find that her analysis of this question supports a finding of a violation of a substantive right.

Acknowledging that "[t]his is a difficult case to analyze," the presiding official carefully weighed the testimony and evidence regarding this issue. See Initial Decision at 6-8 and 11-12. She found that the appellant's supervisor monitored her for more than six months before commencing the instant adverse action against her, and that such procedure would ordinarily satisfy the agency's duty to afford an employee a reasonable opportunity to improve. However, she concluded, on the basis of the supervisor's testimony, the frequency and tenor of his confidential memoranda to the personnel file regarding the appellant's performance, and the nature of his counselling sessions with her, that the appellant in this case was in fact not given a fair and meaningful opportunity to improve her performance before her demotion was instituted. From her assessment of testimonial credibility, the presiding official determined that the counselling sessions given the appellant by her supervisor were often disparaging in nature, did not produce guidance or advice on how to improve her work, and were not used to warn her of the possibility of impending or contemplated actions against her based on her performance. Further, she found that the appellant's supervisor, within three days of the beginning of his tenure in that capacity, had judged her incompetent, had begun to assemble a secret, negative record against her designed to support her pre-ordained ultimate demotion, and had thus effectively deprived her of a meaningful opportunity to improve.

The agency's challenge to that finding in its petition for review consists merely of a one-paragraph reiteration of the argument it asserted below and clearly does not,

without more, warrant its reversal. Further, inasmuch as the agency refers to the testimony of the appellant's supervisor, we will defer to the presiding official's assessment of credibility, absent the agency's identification of serious evidentiary error in this regard. Weaver v. Department of Energy, 2 MSPB 297, 299 (1980). Therefore, we find that the agency has failed to counter successfully the appellant's rebuttal evidence challenging the reasonableness of the improvement period afforded her by the agency. As a result, the agency's Chapter 43 action, lacking proof of a substantive element, cannot be sustained.*/

Accordingly, the agency action is NOT SUSTAINED. The initial decision is AFFIRMED as MODIFIED to base the reversal of the agency's Chapter 43 demotion action against the appellant on the agency's failure to prove that the appellant was accorded her substantive right to a meaningful opportunity to demonstrate acceptable performance under 5 U.S.C. § 4302(b)(6).

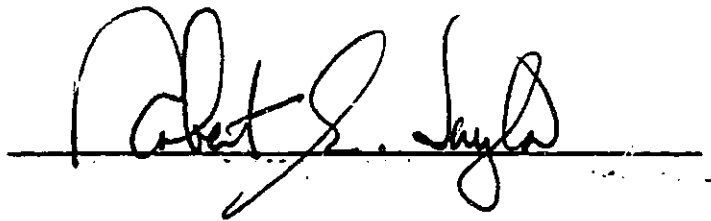
The agency is hereby ORDERED to cancel the appellant's demotion and to award back pay and benefits in accordance with 5 C.F.R. § 550.805. Proof of compliance with this decision shall be submitted by the agency to the Office of the Clerk of the Board within twenty (20) days of the issuance of this Order. Any petition for enforcement of this Order shall be made to the Philadelphia Regional Office in accordance with 5 C.F.R. Section 1201.181(a).

*/ Consequently, we need not address the remaining arguments set forth in the agency's petition for review.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the Court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

A handwritten signature in dark ink, appearing to read "Robert E. Taylor", is written over a horizontal line.

Washington, D.C.

Robert E. Taylor
Clerk of the Board